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February 1, 2022

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## VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

**RE:** Notice of Violations and Intent to File Suit Under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (“CLF”)<sup>1</sup> hereby gives notice to Nylon Corporation of America, Inc., Wembly Enterprises, LLC, and their agents and directors (collectively, “Nylon” or “the Facility”) of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act (“Clean Water Act,” “CWA,” or “Act”), 33 U.S.C. § 1365(a), for violations of the

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<sup>1</sup> CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England’s environment. Its mission includes the conservation and protection of New England’s waters for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. The interests of CLF’s members are adversely affected by Nylon’s discharges of wastewater and stormwater pollution to the receiving waters in violation of the Clean Water Act.

## CONSERVATION LAW FOUNDATION

Act specified below. This letter constitutes notice pursuant to 40 C.F.R., Part 135 (the “Notice”) to the addressed persons of CLF’s intention to file suit in the United States District Court for the District of New Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than sixty days from the postmark of this Notice letter.

The subject of this action is Nylon’s failure to comply with its 2008 and 2019 wastewater permits<sup>2</sup> (the “2008 Wastewater Permit” and the “2019 Wastewater Permit,” collectively, the “Wastewater Permits”) and the 2015 and 2021 Multi-Sector General Permits<sup>3</sup> (the “2015 MSGP” and the “2021 MSGP,” collectively, the “MSGPs”). Nylon has discharged and continues to discharge wastewater into waters of the United States in a manner that violates the terms of its Wastewater Permits in at least the following ways: (1) by violating the Wastewater Permits’ effluent limitation and the State’s Certification requirement for pH;<sup>4</sup> (2) by violating the Wastewater Permits’ effluent limitations for temperature;<sup>5</sup> (3) by violating the Wastewater Permits’ prohibition on discharges that violate state water quality standards, lower the legislated water quality classification, or interfere with the water’s assigned use;<sup>6</sup> (4) by violating the Wastewater Permits’ requirement that the receiving waters remain free of pollutants and non-natural effects that interfere with designated uses;<sup>7</sup> and (5) by violating the Wastewater Permits’ monitoring and reporting requirements.<sup>8</sup>

Additionally, Nylon has discharged and continues to discharge stormwater to waters of the United States in a manner that violates the terms of the MSGPs in at least the following ways: (1) by violating the MSGPs’ requirement to take corrective actions following certain triggering events;<sup>9</sup> (2) by violating the MSGPs’ requirement to control its stormwater discharges so as to meet applicable water quality standards;<sup>10</sup> (3) by violating the MSGPs’ requirement to control its discharges to minimize pollution;<sup>11</sup> and (4) by violating the MSGPs’ monitoring and reporting requirements.<sup>12</sup>

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<sup>2</sup> U.S. EPA, NPDES PERMIT NH0000116 (2008), <https://www3.epa.gov/region1/npdes/permits/2008/finalnh0000116permit.pdf>, [hereinafter 2008 Wastewater Permit]; U.S. EPA, NPDES PERMIT NH0000116 (2019), <https://www3.epa.gov/region1/npdes/permits/2019/finalnh0000116permit.pdf>, [hereinafter 2019 Wastewater Permit].

<sup>3</sup> U.S. EPA, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP), [https://www.epa.gov/sites/default/files/2015-10/documents/msgp2015\\_finalpermit.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/msgp2015_finalpermit.pdf) [hereinafter 2015 MSGP]; U.S. EPA, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY, <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-epas-2021-msgp> [hereinafter 2021 MSGP].

<sup>4</sup> See *infra* at 6.

<sup>5</sup> See *infra* at 6.

<sup>6</sup> See *infra* at 6-7.

<sup>7</sup> See *infra* at 7-8.

<sup>8</sup> See *infra* at 9.

<sup>9</sup> See *infra* at 9-10.

<sup>10</sup> See *infra* at 6-7.

<sup>11</sup> See *infra* 10-11.

<sup>12</sup> See *infra* 11.

**CONSERVATION LAW FOUNDATION****LOCATION OF THE ALLEGED VIOLATIONS**

The violations alleged in this Notice have occurred and continue to occur at the Nylon facility located along the eastern bank of the Merrimack River at 333 Sundial Avenue in Manchester, New Hampshire, 03103 (the “Facility”).

**PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS**

Nylon Corporation of America, Inc. (“NYCOA”) and Wembly Enterprises, LLC (“Wembly”) (together, “Nylon”), are the persons, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Nylon and its agents and directors have operational control of the activities at the Facility and are responsible for ensuring that the Facility operates in compliance with its Permits.<sup>13</sup>

**BACKGROUND**

Nylon is a nylon production facility regulated under the Clean Water Act.<sup>14</sup> The Facility discharges wastewater pursuant to the Wastewater Permits issued by the Environmental Protection Agency (“EPA”). The Facility’s wastewater discharges from September 23, 2008 until July 31, 2019, were permitted by the 2008 Wastewater Permit. The Facility’s wastewater discharges from August 1, 2019 until the present are permitted by the 2019 Wastewater Permit. Nylon also discharges stormwater pursuant to the MSGPs issued by EPA. The Facility’s stormwater discharges from June 4, 2015 until March 1, 2021 were permitted by the 2015 MSGP. The Facility’s stormwater discharges from March 1, 2021 until the present are permitted by the 2021 MSGP.

**A. Nylon’s discharges are dangerous to human health and aquatic ecosystems.***Wastewater Discharges*

The Facility discharges non-contact cooling wastewater from outfall Serial Number 004 and backwash wastewater from outfall Serial Number 007<sup>15</sup> into the segment of the Merrimack River designated as Waterbody NHRIV700060803-14-02.<sup>16</sup> The Facility’s discharges have repeatedly been below the Wastewater Permits’ minimum pH level of 6.5 standard units (S.U.) and above the maximum daily temperature limitation of 83° F.<sup>17</sup>

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<sup>13</sup> See *Business Information - Nylon Corporation of America, Inc.* (“NYCOA”), N.H. DEP’T STATE, <https://quickstart.sos.nh.gov/online/BusinessInquire/BusinessInformation?businessID=57477> (last visited Jan. 28, 2022); NYCOA has operated the facility since at least 1994 and Wembly has operated the facility since at least 2013 when it acquired NYCOA. *Our Strategy*, WEMBLY ENTER., <http://wemblyenterprises.com/> (last visited Jan. 27, 2022); *About Us*, NYLON CORP., <http://nycoa.com/about-1> (last visited Jan. 27, 2022).

<sup>14</sup> Home Page, NYCOA, <http://nycoa.com/> (last visited Jan. 27, 2022).

<sup>15</sup> 2019 Wastewater Permit Fact Sheet, *supra* note 2, at 11. The process for the production of nylon uses non-contact cooling water withdrawn from a pair of cooling water intake structures that are located near the bottom of the Merrimack River to reduce or control the temperature of various stages of the manufacturing process. The withdrawn water is passed through an intake water strainer to filter out solids prior to its use as non-contact cooling water.

<sup>16</sup> 2008 Wastewater Permit, *supra* note 2, at 2-3; 2019 Wastewater Permit, *supra* note 2, at 2, 5.

<sup>17</sup> 2008 Wastewater Permit, *supra* note 2, at 2-3; 2019 Wastewater Permit, *supra* note 2, at 2, 5.

**CONSERVATION LAW FOUNDATION**

Fluctuating pH or sustained pH outside the optimal range of 6.5-8 S.U. physiologically stresses many species and can result in decreased reproduction, decreased growth, disease or death, and, ultimately, reduced biological diversity in waterbodies.<sup>18</sup> Even small changes in pH can shift community composition in waterbodies because pH alters the chemical state of many pollutants, including aluminum and mercury.<sup>19</sup> Acidic conditions increase the solubility, transport, and bioavailability of these pollutants, thereby rendering them more toxic and increasing the exposure of aquatic plants and animals.<sup>20</sup>

Fish, insects, zooplankton, phytoplankton, and other aquatic species all have specific temperature ranges necessary for their survival.<sup>21</sup> As temperatures get too far above or below a species' required range, the number of individuals of the species decreases.<sup>22</sup> Increases in water temperatures can lead to an increase in pathogens, nutrients, algal blooms, rates of water evaporation, and invasive species.<sup>23</sup>

#### *Stormwater Discharges*

Each day of precipitation, the Facility discharges stormwater runoff, which carries pollutants from its industrial activities, including zinc and other heavy metals, into the Merrimack River at Waterbody NHRI700060803-14-02.

Heavy metals like zinc are toxic, endanger human and animal health, and imperil aquatic ecosystems. Exposure to heavy metals in drinking water can cause serious health issues.<sup>24</sup> Zinc bioaccumulates throughout the food chain, endangering predator species.<sup>25</sup>

#### **B. Nylon is discharging into waters of the United States that are already impaired.**

The Merrimack River – a water of the United States – is designated as a Class B waterbody pursuant to RSA 485-A:8, meaning that it is suitable for fishing, swimming and other

<sup>18</sup> *pH Fact Sheet*, U.S. EPA, <https://www.epa.gov/caddis-vol2/caddis-volume-2-sources-stressors-responses-ph#low> (last visited Jan. 27, 2022).

<sup>19</sup> U.S. EPA, *supra* note 18; Swati Hedge, *Impacts of Aluminum on Aquatic Organisms and EPA's Aluminum Criteria*, WATER CTR., UNIV. PENN. BLOG (Jan. 12, 2019), <https://watercenter.sas.upenn.edu/impacts-of-aluminum-on-aquatic-organisms-and-epas-aluminum-criteria/>; *Ambient Water Quality Criteria for Aluminum*, U.S. EPA, <https://www3.epa.gov/npdes/pubs/owm587.pdf> (last visited Jan. 27, 2022); C A Kelly, et. al., *Effect of pH on Mercury Uptake By an Aquatic Bacterium: Implications for Hg Cycling*, ENV'T SCI. TECHNOL. (2003); Michael R. Winfrey & John W. M. Rudd, *Environmental Factors Affecting the Formation of Methylmercury in Low pH Lakes*, 9 ENV'T TOXICOLOGY & CHEMISTRY, 853 (1990).

<sup>20</sup> U.S. EPA, *supra* note 18.

<sup>21</sup> *Temperature and Water*, UNITED STATES GEOLOGICAL SURVEY (June 6, 2018), <https://www.usgs.gov/special-topics/water-science-school/science/temperature-and-water>.

<sup>22</sup> *Id.*

<sup>23</sup> *Effect of Climate Change on Water Resources and Programs*, U.S. EPA, [https://cfpub.epa.gov/waterrain/moduleFrame.cfm?parent\\_object\\_id=2456&object\\_id=2459](https://cfpub.epa.gov/waterrain/moduleFrame.cfm?parent_object_id=2456&object_id=2459) (last visited Jan. 27 2022).

<sup>24</sup> See, e.g., Agency for Toxic Substances and Disease Registry ("ATSDR"), *Toxicological Profile ("Tox. Prof.") for Zinc*, 2005 U.S. DEPT. HEALTH & HUM. SERVS., PUB. HEALTH SERVS. 4-6 ("HHS")), <https://www.atsdr.cdc.gov/ToxProfiles/tp60.pdf>.

<sup>25</sup> *Id.*

**CONSERVATION LAW FOUNDATION**

recreational purposes, and for use as a water supply after adequate treatment.<sup>26</sup> The Merrimack River is part of the Merrimack River Watershed, which covers 5,010 square miles, and is a source of drinking water for approximately 500,000 people in New Hampshire and Massachusetts.<sup>27</sup> The river originates in Franklin, New Hampshire and flows 115 miles downstream and discharges to the Atlantic Ocean in Newburyport, Massachusetts.<sup>28</sup> The Merrimack River is habitat for wildlife and aquatic life (“fish, shellfish, and wildlife protection and propagation”), and is a popular recreational river; used for swimming, paddling, boating, and fishing.<sup>29</sup>

The Facility discharges wastewater and stormwater into the Merrimack River at Waterbody NHRI700060803-14-02.<sup>30</sup> This segment of the river is impaired for the uses of aquatic life as a result of aluminum, dissolved oxygen saturation, and pH; impaired for fish consumption as a result of mercury; and impaired for primary contact recreation as a result of Escherichia Coli (*E. Coli*). This segment of the river is also subject to the Northeast Regional Mercury and *E. Coli* Total Maximum Daily Loads (TMDLs).<sup>31</sup>

### **STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED**

The Facility is required to comply with its Permits in order to discharge lawfully under the Clean Water Act. Pursuant to its Wastewater Permits, the Facility has been specifically required, *inter alia*, to ensure that the effluent it discharges (1) has a pH level between 6.5 and 8 S.U. (except when due to natural causes),<sup>32</sup> (2) does not exceed the maximum daily temperature limitation of 83° F;<sup>33</sup> and (3) does not cause a violation of state water quality standards.<sup>34</sup> The Facility is further required to (4) ensure that the Merrimack River remains free from pollutants that produce adverse effects and render it unsuitable for its designated uses and/or result in any demonstrable harm to aquatic life;<sup>35</sup> and (5) comply with the Wastewater Permits’ monitoring and reporting requirements.<sup>36</sup>

Additionally, pursuant to the MSGPs, the Facility is required, *inter alia*, to (1) take corrective actions following certain triggering events;<sup>37</sup> (2) control its stormwater discharges so as to meet

<sup>26</sup> N.H. REV. STAT. ANN. § 485-A:8 (2021); U.S. ARMY CORPS OF ENG’RS, MERRIMACK RIVER WATERSHED ASSESS. STUDY, 4-26 (2006); MASS. EXEC. OFFICE ENVTL. AFFAIRS, MERRIMACK RIVER: A COMPREHENSIVE WATERSHED ASSESS. REPORT, 1 (2001).

<sup>27</sup> About the Merrimack, U.S. EPA, <https://www.epa.gov/merrimackriver/about-merrimack#B> (last visited Jan. 28, 2022).

<sup>28</sup> *Id.*

<sup>29</sup> The Merrimack River, MASS. RIVER ALL. <https://www.massriversalliance.org/merrimack-river> (last visited Jan. 28, 2022).

<sup>30</sup> 2019 Wastewater Permit Fact Sheet, *supra* note 2, at 13.

<sup>31</sup> U.S. EPA, How’s My Waterway, 2014 Waterbody Report for Merrimack River (NHRI700060803-14-02).

<sup>32</sup> 2008 Wastewater Permit, *supra* note 2, at 2-3; 2019 Wastewater Permit, *supra* note 2, at 2, 5.

<sup>33</sup> 2008 Wastewater Permit, *supra* note 2, at 2-3; 2019 Wastewater Permit, *supra* note 2, at 2, 5.

<sup>34</sup> 2008 Wastewater Permit, *supra* note 2, at 4; 2019 Wastewater Permit, *supra* note 2, at 8.

<sup>35</sup> 2008 Wastewater Permit, *supra* note 2, at 4; 2019 Wastewater Permit, *supra* note 2, at 8.

<sup>36</sup> 2008 Wastewater Permit, *supra* note 2, at 6; 2019 Wastewater Permit, *supra* note 2, at 2; 2019 Wastewater Permit Fact Sheet, *supra* note 2, at 10; 2019 Wastewater Permit Part II Standards Conditions, *supra* note 2, at 9-10.

<sup>37</sup> 2015 MSGP, *supra* note 3, § 6.2.1.2, at 42, § 2.1, at 14, § 3.2.1, at 24, § 4.1, at 27; 2021 MSGP, *supra* note 3, § 4.2.2.3, at 39, § 5.1.1.2, at 45, § 5.2.2, at 47, 5.1.1.1, at 45, § 3.2.2.5, at 30, § 5.1.1, at 45.

**CONSERVATION LAW FOUNDATION**

applicable water quality standards;<sup>38</sup> (3) control its discharges to minimize pollution;<sup>39</sup> and (4) comply with monitoring and reporting requirements.<sup>40</sup>

The Facility has failed to comply with these requirements of its Permits during various periods within the past five years and on an ongoing basis. Therefore, it has been and is operating in violation of the Clean Water Act and applicable regulations, as well as the State's Certification requirements pertaining to pH and water quality standards. CLF hereby provides notice that it intends to pursue claims in the U.S. District Court for the District of New Hampshire related to these violations, which are more fully described below.

### **ACTIVITIES ALLEGED TO BE VIOLATIONS**

The Facility's violations of its Wastewater Permits and MSGPs, as described below, are violations of Sections 301(a) and 402 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a) and 1344, and 40 CFR §§ 122.44 and 122.26.

- A. Nylon has discharged, is discharging, and will continue to discharge effluent to waters of the United States in violation of the Wastewater Permits' pH limitations.**

The Wastewater Permits require that effluent discharged from the Facility have a pH level within a specified range of 6.5 to 8.0 S.U.<sup>41</sup> The pH requirement takes two forms, as both an effluent limitation and a State Certification requirement.<sup>42</sup> In the last five years, the Facility's own monitoring data has documented at least 27 violations of the Wastewater Permits' minimum pH level requirement of 6.5 S.U.

- B. Nylon has discharged, is discharging, and will continue to discharge effluent to navigable waters in violation of the Wastewater Permits' effluent limitations for temperature.**

The Wastewater Permits contain an effluent limitation for temperature, establishing a maximum daily temperature limitation of 83° F.<sup>43</sup>

Over the last five years, the discharge temperature of the Facility's non-contact cooling water has exceeded the 83°F limitation on at least six separate occasions, in violation of the Facility's Wastewater Permits.

- C. Nylon has discharged, is discharging, and will continue to discharge effluent to waters of the United States in violation of 1) the Wastewater Permits' prohibition against violating state water quality standards, lowering the legislated water quality classification, and interfering with the water's**

<sup>38</sup> 2015 MSGP, *supra* note 3, § 2.2.1, at 20; 2021 MSGP, *supra* note 3, § 3.3.1, at 25.

<sup>39</sup> 2015 MSGP, *supra* note 3, § 2.1, at 14; 2021 MSGP, *supra* note 3, § 2.1, at 18.

<sup>40</sup> 2015 MSGP, *supra* note 3, § 6, 6.1.3, 6.1.7, at 39-40; 2021 MSGP, *supra* note 3, § 4, 4.1.3, 4.1.7, at 31-33.

<sup>41</sup> 2008 Wastewater Permit, *supra* note 2, at 2-3, 4; 2019 Wastewater Permit, *supra* note 2, at 2, 5, 17, 19, 21.

<sup>42</sup> 2008 Wastewater Permit, *supra* note 2, at 2-3, 4; 2019 Wastewater Permit, *supra* note 2, at 2, 5, 17, 19, 21.

<sup>43</sup> 2008 Wastewater Permit, *supra* note 2, at 2-3; 2019 Wastewater Permit, *supra* note 2, at 2, 5.

## CONSERVATION LAW FOUNDATION

**assigned use; and 2) the MSGPs' prohibition against violating water quality standards.**

The Wastewater Permits include an effluent limitation requiring that discharges "shall not cause a violation of the water quality standards of the receiving water."<sup>44</sup> The 2019 Wastewater Permit further prohibits the discharge of waste "unless it has been treated in such a manner as will not lower the legislated water quality classification or interfere with the uses assigned to said water by the New Hampshire Legislature (RSA 485-A:12)."<sup>45</sup>

Additionally, under the MSGP Permits, Nylon is required to control its stormwater discharges "to meet applicable water quality standards of all affected states."<sup>46</sup>

New Hampshire's state water quality standards include Env-Wq 1703.01 (Water Use Classification; Designated Uses), which require that "[a]ll surface waters shall provide, wherever attainable, for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the surface waters,"<sup>47</sup> Env-Wq 1703.03 (General Water Quality Criteria) and Env-Wq 1703.12 (Slicks, Odors, and Surface Floating Solids), which establish certain physical, chemical, and biological criteria for all surface waters and prohibit unnaturally occurring surface floating solids;<sup>48</sup> Env-Wq 1703.19 (Biological and Aquatic Community Integrity), which include requirements for the protection of biological and aquatic community integrity;<sup>49</sup> and Env-Wq 1703.21 (Water Quality Criteria for Toxic Substances), which pertains to toxic substances.<sup>50</sup>

Nylon's wastewater and stormwater discharges have caused or contributed to the violation of the above-referenced New Hampshire water quality standards, have caused or contributed to the lowering of the legislated water quality classification, and have interfered with designated uses. As described above (*see "Background" section, supra*), the relevant segment of the Merrimack River is impaired for the uses of aquatic life, in part as a result of pH, aluminum, and mercury. Nylon's operation, which includes significant wastewater discharges of low-pH effluent in violation of its effluent limits and state certification requirements, is causing or contributing to these water quality problems.

Additionally, Nylon's stormwater discharges of visible and malodorous pollutants further interfere with the ability of the receiving waters to meet water quality standards and fulfill their designated uses. Upon information and belief, Nylon's discharges over the last five years have contained and continue to contain floating, suspended, and settleable solids; and/or high concentrations of toxic pollutants. These discharges impair the designated uses of their receiving water and are harmful to aquatic life and ecosystems.

<sup>44</sup> 2008 Wastewater Permit, *supra* note 2, at 4; 2019 Wastewater Permit, *supra* note 2, at 8.

<sup>45</sup> 2019 Wastewater Permit, *supra* note 2, at 13.

<sup>46</sup> 2015 MSGP, *supra* note 3, § 2.2.1, at 20; 2021 MSGP, *supra* note 3, § 3.3.1, at 25.

<sup>47</sup> N.H. CODE ADMIN. R. Env-Wq 1703.01(c) (2021).

<sup>48</sup> N.H. CODE ADMIN. R. Env-Wq 1703.09(b) (2021).

<sup>49</sup> N.H. CODE ADMIN. R. Env-Wq 1703.19 (2021).

<sup>50</sup> N.H. CODE ADMIN. R. Env-Wq 1703.21(a) (2021) (all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that: (1) [i]njure or are inimical to plants, animals, humans or aquatic life; or (2) [p]ersist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in edible portions of fish, shellfish, other aquatic life, or wildlife which might consume aquatic life).

## CONSERVATION LAW FOUNDATION

- D. Nylon has discharged, is discharging, and will continue to discharge effluent to waters of the United States in violation of the Wastewater Permits' requirement that the receiving water remain free of pollutants and non-natural effects that interfere with designated uses.**

Nylon's Wastewater Permits contain discharge prohibitions relating to foam and visible substances; unnatural odor, color, taste or turbidity; nuisance species; interference with recreational activities and other designated uses; oil and grease; and floating solids.<sup>51</sup>

The Wastewater Permits further prohibit discharges of toxic or injurious concentrations or combinations of pollutants,<sup>52</sup> and discharges that persist in the environment or accumulate in aquatic organisms in harmful concentrations.<sup>53</sup>

Upon information and belief, over the last five years Nylon has discharged and continues to discharge wastewater from the Facility (including but not limited to effluent discharges below the minimum pH levels and above the maximum temperature) which contains foam and visible substances, has interfered with recreational activities and other designated uses, and has resulted in concentrations of toxic substances or chemical constituents that injured plants, animals, humans, or aquatic life and persisted in the environment.

- E. Nylon has violated, is violating, and will continue to violate the Wastewater Permits' monitoring requirements.**

Nylon's 2019 Wastewater Permit specifically requires the Facility to monitor the maximum daily total residual chlorine for Outfall 004 once per week with a grab sample and report the results to EPA quarterly.<sup>54</sup> On at least one occasion in August 2020, the Facility failed to monitor for and report the maximum daily total residual chlorine in violation of its 2019 Wastewater Permit.

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<sup>51</sup> 2008 Wastewater Permit, *supra* note 2, at 4 (discharges "must remain free from pollutants in concentrations or combinations that settle to form harmful deposits, float as foam, debris, scum or other visible pollutants. [They] shall remain free from pollutants which produce odor, color, taste or turbidity in the receiving waters which is not naturally occurring and would render it unsuitable for its designated uses"); 2019 Wastewater Permit, *supra* note 2, at 8 ("The discharge[s] shall be free from substances in kind or quantity that settle to form harmful benthic deposits; float as foam, debris, scum or other visible substances; produce odor, color, taste or turbidity that is not naturally occurring and would render the surface water unsuitable for its designated uses; result in the dominance of nuisance species; or interfere with recreational activities"); *id.* at 8 ("The discharge shall not result in oil and grease, color, slicks, odors, or surface floating solids that would impair any existing or designated receiving water uses").

<sup>52</sup> 2008 Wastewater Permit, *supra* note 2, at 4 (prohibiting the "discharge into receiving waters of any pollutant or combination of pollutants in toxic amounts"); 2019 Wastewater Permit, *supra* note 2, at 8 (prohibiting discharges that "result in toxic substances or chemical constituents in concentrations or combinations in the receiving water that injure or are inimical to plants, animals, humans or aquatic life").

<sup>53</sup> 2019 Wastewater Permit, *supra* note 2, at 8 (prohibiting discharges that "persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in edible portions of fish, shellfish, other aquatic life, or wildlife that might consume aquatic life").

<sup>54</sup> 2019 Wastewater Permit, *supra* note 2, at 2.

## CONSERVATION LAW FOUNDATION

**F. Nylon has violated, is violating, and will continue to violate the Wastewater Permits' reporting requirements.**

The 2019 Wastewater Permit requires Nylon to report any noncompliance which may endanger health or the environment verbally within 24 hours from the time it becomes aware of the circumstances. Additionally, Nylon must submit a written report to EPA detailing the noncompliance within 5 days.<sup>55</sup> Upon information and belief, on at least one occasion since 2019, Nylon has failed to notify EPA of its noncompliance with its 2019 Wastewater Permit.

Both Wastewater Permits also require Nylon to submit discharge monitoring reports to EPA by the 15<sup>th</sup> of each month.<sup>56</sup> On several occasions over the last five years, Nylon has failed to submit discharge monitoring reports to EPA, has improperly/incorrectly filed discharge monitoring reports, and has untimely submitted discharge monitoring reports.

**G. Nylon has violated, is violating, and will continue to violate the MSGPs' requirement to take corrective actions following certain triggering events.**

The MSGPs require Nylon to take corrective action or implement Additional Implementation Measures (“AIM”) when the following triggering events occur:<sup>57</sup> 1) the annual average of four quarterly sampling results exceeds the applicable benchmark or when an exceedance of the four-quarter average is mathematically certain;<sup>58</sup> 2) control measures do not adequately minimize discharges to meet applicable water quality standards;<sup>59</sup> 3) a visual assessment shows evidence of stormwater pollution in the discharge;<sup>60</sup> or 4) an inspection reveals that discharges are not adequately controlled.<sup>61</sup>

The MSGPs include sector-specific benchmarks for facilities like Nylon that fall under Sector Y: Rubber, Miscellaneous Plastic Products, and Miscellaneous Manufacturing Industries. The benchmark values for zinc are 0.04 mg/L in the 2015 MSGP<sup>62</sup> and 0.037mg/L in the 2021 MSGP.<sup>63</sup>

Following a triggering event, Nylon is required to 1) review and revise the Stormwater Pollution Prevention Plan to minimize pollutant discharges;<sup>64</sup> 2) immediately take “all reasonable steps to minimize or prevent the discharge of pollutants until [it] can implement a permanent solution;”<sup>65</sup>

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<sup>55</sup> 2019 Wastewater Permit Part II Standards Conditions, *supra* note 2, at 9-10.

<sup>56</sup> 2008 Wastewater Permit, *supra* note 2, at 6; 2019 Wastewater Permit Fact Sheet, *supra* note 2, at 10.

<sup>57</sup> AIM is a step-wise corrective action procedure triggered by benchmark exceedances in the 2021 MSGP.

<sup>58</sup> 2015 MSGP, *supra* note 3, § 4.2, at 27, § 6.2.1.2, at 42; 2021 MSGP, *supra* note 3, § 4.2.2.3, at 39, § 5.1.1.2, at 45, § 5.2.2, at 47.

<sup>59</sup> 2015 MSGP, *supra* note 3, § 2.1, at 14; 2021 MSGP, *supra* note 3, § 5.1.1.1, at 45 (stormwater control measures are not stringent enough to control stormwater discharges as necessary to ensure receiving water will meet applicable water quality standards).

<sup>60</sup> 2021 MSGP, *supra* note 3, § 3.2.2.5, at 30; § 5.1.1, at 45; 2015 MSGP, *supra* note 3, § 3.2.1, at 24.

<sup>61</sup> 2015 MSGP, *supra* note 3, § 4.1, at 27; 2021 MSGP, *supra* note 3, § 5.1.1, at 45.

<sup>62</sup> 2015 MSGP, *supra* note 3, § 8.Y.6, at 161 (the benchmark value for zinc is variable and set based on the hardness of the receiving water).

<sup>63</sup> 2021 MSGP, *supra* note 3, § 8.Y.5, at 198-199 (the benchmark value for zinc is variable and set based on the hardness of the receiving water).

<sup>64</sup> 2015 MSGP, *supra* note 3, § 4.2, at 26; 2021 MSGP, *supra* note 3, § 5.1.1, § 45.

<sup>65</sup> 2015 MSGP, *supra* note 3, § 4.3.1, at 28; 2021 MSGP, *supra* note 3, § 5.1.3.1, at 46.

**CONSERVATION LAW FOUNDATION**

and 3) if necessary, take subsequent actions before the next storm event if possible and within 14 calendar days from the time of discovery.<sup>66</sup>

The 2015 MSGP allowed Nylon to fulfill corrective action requirements triggered by benchmark exceedances by making a determination that no further pollutant reductions were technologically available and economically practicable and achievable in light of best industry practice to meet the effluent limits.<sup>67</sup> To take advantage of this provision, Nylon was required to continue monitoring once per year, document its rationale for the determination, retain all related records with its Stormwater Pollution Prevention Plan (“SWPPP”), and include in its annual report its rationale for why it believed no further reductions were achievable.<sup>68</sup> Upon information and belief, Nylon has not made the determination that no further pollutant reductions are technologically available and economically practicable and achievable in light of best industry practice at the Facility.<sup>69</sup>

Upon information and belief, Nylon has not taken corrective action or implemented AIMs as required by the MSGPs following triggering benchmark exceedances, visual assessments, or facility inspections. Over the last five years, Nylon has exceeded the four-quarter average pollutant benchmark values for zinc at least 9 times. Additionally, upon information and belief, Nylon’s routine visual assessments and facility inspections have indicated that its discharges are not adequately controlled.<sup>70</sup> Specifically, Nylon has reported solid matter, including floating, suspended, and settled solids. Nylon will continue to make such observations in annual reports for future years.

#### **H. Nylon has failed to control its discharges to minimize pollutants, as evidenced by its numerous benchmark exceedances for zinc.**

The MSGPs mandate that Nylon control its discharges so as to “minimize pollutants” and lay out detailed requirements for how stormwater discharges should be controlled.<sup>71</sup> Nylon must comply with the MSGPs’ requirements related to pollutant control, including minimize exposure of manufacturing, processing, and material storage areas to rain, snow, snowmelt and runoff (2.1.2.1); perform good housekeeping measures and keep clean all exposed areas that are potential sources of pollutants (2.1.2.2);<sup>72</sup> maintain all control measures (2.1.2.3); conduct spill prevention and response measures (2.1.2.4); minimize erosion and control sediment (2.1.2.5); reduce runoff (2.1.2.6); train employees (2.1.2.8); and minimize dust generation (2.1.2.10).

Additionally, the MSGPs mandate specific control measures for Sector Y industries to minimize zinc in stormwater discharges, including control measures that ensure proper handling and

<sup>66</sup> 2015 MSGP, *supra* note 3, § 4.3.2, at 28; 2021 MSGP, *supra* note 3, § 5.1.3.2, at 46.

<sup>67</sup> 2015 MSGP, *supra* note 3, § 6.2.1.2, at 42.

<sup>68</sup> *Id.*; 2015 MSGP, *supra* note 3, 7.5, at 49.

<sup>69</sup> 2015 MSGP, *supra* note 3, § 6.2.1.2., at 42; § 7.5, at 49.

<sup>70</sup> 2015 MSGP, *supra* note 3, § 4.1, at 27; 2021 MSGP, *supra* note 3, § 5.1.1, at 45.

<sup>71</sup> 2015 MSGP, *supra* note 3, § 2.1, at 14; 2021 MSGP, *supra* note 3, § 2.1, at 18.

<sup>72</sup> 2021 MSGP, *supra* note 3, § 2.1.2.2, at 20-21; including: sweep or vacuum at regular intervals or, alternatively, wash down the area and collect and/or treat, and properly dispose of the washdown water, store materials in appropriate containers, keep all dumpster lids closed when not in use, minimize the potential for waste, garbage and floatable debris to be discharged by keeping exposed areas free of such materials, or by intercepting them before they are discharged.

**CONSERVATION LAW FOUNDATION**

storage of zinc bags, minimize discharges of zinc from dumpsters, minimize contributions of zinc to stormwater from dust collectors and baghouses, minimize contamination of stormwater as a result of dust generation from rubber grinding operations; and minimize the potential for stormwater contamination from drips and spills of zinc stearate slurry.<sup>73</sup>

To ensure that Nylon's discharges are adequately controlled, Nylon is required to conduct routine facility inspections at least quarterly. During facility inspection, Nylon must observe the above stormwater control measures to ensure they are functioning correctly.

Nylon has failed and continues to fail to adequately control its discharge of pollutants as required by the MSGPs. This failure is evidenced by Nylon's exceedance of the MSGPs' benchmark value for zinc at least 30 times since January 2017.

**I. Nylon has violated, is violating, and will continue to violate the MSGPs' monitoring and reporting requirements.**

The MSGPs require Nylon to collect and analyze a stormwater sample at least once per quarter and submit its monitoring data to EPA.<sup>74</sup> In the event that adverse weather conditions prevent the collection of a required quarterly stormwater sample, Nylon is required "to take a substitute sample during the next qualifying storm event."<sup>75</sup> As Nylon's activities fall under subsector Y, Nylon is required to conduct benchmark monitoring for zinc on its quarterly stormwater samples.<sup>76</sup>

Additionally, where Nylon discharges into impaired receiving waters that lack a TMDL, the company is required to annually monitor for all pollutants for which the receiving waterbody is impaired.<sup>77</sup>

Upon information and belief, the additional pollutant criteria for which Nylon is required to monitor include aluminum, mercury, dissolved oxygen saturation, pH, and *E. coli*.

Over the last five years, Nylon has failed to conduct benchmark monitoring for zinc on at least 35 occasions. Additionally, since 2017, Nylon has failed to monitor and report at least 55 required impairment monitoring values. Upon information and belief, when Nylon failed to monitor as required due to weather, it did not conduct additional stormwater monitoring in the next quarter as required. Nylon has also failed to submit discharge monitoring reports to EPA as required, has improperly/incorrectly filed discharge monitoring reports, and has untimely submitted discharge monitoring reports.

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<sup>73</sup> 2015 MSGP, *supra* note 3, § 8.Y, at 160; 2021 MSGP, *supra* note 3, § 8.Y, at 197.

<sup>74</sup> 2015 MSGP, *supra* note 3, § 6, 6.1.3, 6.1.7, 6.1.9, at 39-40; 2021 MSGP, *supra* note 3, § 4, 4.1.3, 4.1.7, 4.1.9, at 31-33.

<sup>75</sup> 2015 MSGP, *supra* note 3, § 6.1.5, at 39-40 ("Adverse weather does not exempt you from having to file a benchmark monitoring report in accordance with your sampling schedule."); 2021 MSGP, *supra* note 3, § 4.1.5, at 33.

<sup>76</sup> 2015 MSGP, *supra* note 3, § 6.2, at 40-41, § 8.Y, at 160-161; 2021 MSGP, *supra* note 3, § 4.2, at 33-35, § 8.Y, at 197-199.

<sup>77</sup> 2015 MSGP, *supra* note 3, § 6.2.4.1, at 45; 2021 MSGP, *supra* note 3, § 4.2.5.1, at 42.

**CONSERVATION LAW FOUNDATION**

**DATES OF THE VIOLATIONS**

Each day Nylon operated the Facility while failing to comply with the terms of the Wastewater Permits and MSGPs constitutes a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Nylon has not been in compliance with the Wastewater Permits since at least January 2017.

Nylon has not been in compliance with the MSGPs since at least January 2017.

Nylon's CWA violations are ongoing and continuous. Barring a change in the wastewater and stormwater management controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, Nylon's violations will continue indefinitely.

**RELIEF REQUESTED**

Nylon is liable for the above-described violations. Each separate violation of the Clean Water Act subjects the violator to a penalty of up to \$56,460 per day per violation for all violations occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020, pursuant to sections 309(d) and 505(a) of the CWA, 33 U.S.C. §§ 1319(d), 1365(a); and 40 C.F.R. §§ 19.1–19.4. CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a), 33 U.S.C. § 1365(a), and such other relief as permitted by law. CLF will seek an order from the Court requiring Nylon to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

**CONCLUSION**

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Erica Kyzmir-McKeon by February 21, 2022 so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,



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**CONSERVATION LAW FOUNDATION**

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